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No. 91-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SHINCHOSHA COMPANY,
Petitioner,
vs.
SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES,
Respondent,

SHIGETO SHIMIZU,
Real Party in Interest.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the trial court abused its discretion in concluding that subject matter jurisdiction over plaintiff's claims against defendant Shinchosha would not offend due process where the trial court found that "[d]efendant's activities in California are wide ranging," "Focus magazine, the subject of this lawsuit, is sold in California," defendant "does sell a substantial number of publications in California," it "does business in California in a broad manner," it "sells its products (albeit through intermediate distributors) in the usual stream of business," it "is aware of the world wide distribution of its products," "[t]he subject article specifically concerned a California resident," and "the accompanying photographs of plaintiff [were] obviously taken in California ... by an agent or representative of defendant [who defendant admits it paid]."

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STATEMENT OF THE CASE

Defendant, already having delayed proceedings in the trial court, California Court of Appeal and Supreme Court for one and a half years by contesting jurisdiction on the basis of meritless arguments that "minimum contacts" sufficient to satisfy due process are absent in this case, now seeks the issuance of an extraordinary order granting *certiorari* prior to trial in the lower court.

Defendant Shinchosha is a Japanese corporation which publishes books and magazines sold by the tens of thousands in the United States. Defendant publishes, *inter alia*, a sensationalist tabloid called Focus magazine which is sold in the United States, including in California.

Plaintiff, a California resident, sued defendant Shinchosha for libel, slander and defamation as a result of an article published in Focus magazine which falsely states, *inter alia*, that plaintiff was arrested and charged with staying illegally in the United States with a forged passport and birth certificate, was pursued in the United States by an "international police dragnet" under suspicion of "swindling 20 million dollars," was rumored to have financial resources provided by an employee of a corporation "affiliated with some gangster organization," put the money that he illegally earned into real estate in California, and attempted to assume Mexican citizenship in California "with a forged Mexican birth certificate." The article concludes by noting that "mak[ing] a bit hit in speculation and hunt[ing] for real estate in overseas markets is a crime which modern Japanese are likely to conceive nowadays."

The California Superior Court, Court of Appeals and Supreme Court have all rejected defendant Shinchosha's claim that its contacts with the State of California are insufficient to justify the assumption of jurisdiction over plaintiff's claims. Associate Justice Sandra D. O'Connor denied defendant a stay pending adjudication of its petition for *certiorari*. Defendant has also recently filed in the trial court a motion to dismiss based on *forum non conveniens*, and a motion to strike the complaint. Both motions were denied. In neither case did defendant seek appellate review. After denying these motions the Superior Court ordered defendant to file an answer by October 12, 1991, which it did.

This case does not raise the "questions presented" and briefed by defendant Shinchosha in its petition for *certiorari*. The trial court did not assert jurisdiction based solely on the distribution of "40 copies of [defendant's] Japanese language magazine ... in California," nor solely on the basis of defendant's "placement of magazines into the stream of commerce," as asserted in defendant's "Questions Presented" and argued throughout the Petition. On the contrary, based on the evidence of record (despite defendant's refusal to fully respond to discovery regarding their California contacts), the Superior Court held that "[d]efendant's activities in California are wide ranging." Ruling on Motion of Defendant Shinchosha Co. to Quash Service of Summons, April 16, 1991 ("Ruling on Motion to Quash"), p. 2.[1] The Superior Court concluded, *inter alia*, that

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[1] Exhibit A to Defendant's Application for Stay.

> Focus magazine, the subject of this lawsuit, is sold in California ... [D]efendant does sell a substantial number of publications in California ... [D]efendant does business in California in a broad manner ... [Defendant] sells its products (albeit through intermediate distributors) in the usual stream of business .. [Defendant] is aware of the world wide distribution of its products ... It publishes and sells by using an apparent systematic business process whereby its products are distributed inside and outside of Japan ... The fact its product reaches the bookstores in California is not surprising and manifests its wide ranging business activities ... The subject article specifically concerned a California resident. The accompanying photograph of plaintiff was obviously taken in California, presumably by an agent or representative of defendant ... This is not a situation where defendant's California activities are occasional ...

Ruling on Motion to Quash, p. 1-2. Contrary to defendant's claim, the Superior Court did not rule that defendant "conducts no business activity in California," nor did it rule that defendant's "placement of [Focus magazine] into the stream of commerce," "without other action by the publisher," justified the assertion of jurisdiction. Petition at p. i (Questions Presented). In short, defendant appears--without ever saying so--to really challenge the factual findings of the trial court, while pretending to challenge its legal conclusions. Defendant's brief is based entirely upon factual assertions rejected by the trial court.

Defendant has now filed a verified answer. This case is finally moving forward and defendant presents no meritorious argument why this Court should now undertake the extraordinary action of granting *certiorari* based upon defendant's disagreement with the trial court's findings of fact regarding subject matter jurisdiction.

STATEMENT OF FACTS

The verified complaint on file in this action alleges that plaintiff is a businessman and resident of Los Angeles, California since 1988. Complaint for Damages for Libel, Slander and Defamation ("Complaint"), ¶ 5; Opposition to Defendant's Motion to Quash, Exhibit 1, Declaration of plaintiff Shigeto Shimizu ("Shimizu Dec. I") ¶ 1. He is a single parent and the sole provider for his five year old United States citizen daughter who lives with him in Los Angeles. Further Supplement to Plaintiff's Opposition to Defendant's Motion to Quash, Exhibit 1, Dec. of Shigeto Shimizu ("Shimizu Dec. II") ¶ 2. Plaintiff Shimizu possesses a valid investor's visa and pursuant thereto has made substantial investments in the United States.[2] Under the Immigration and Nationality Act, unlike most non-immigrants, the investor "E" visa (which plaintiff possesses) does not require that the alien

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[2] *See* Plaintiff's Reply Memorandum in Support of Plaintiff's Cross-Motion for Summary Judgment pp. 18-19, filed in *Shimizu v. Department of State, INS*, Cv. No. 89-2741-WMB (C.D. Cal.), attached as Exhibit E to Defendant's Reply to Plaintiff's Opposition to Motion to Quash Service of Summons, filed in this case April 10, 1991.

enter the United States "temporarily." Gordon and Mailman, *Immigration Law and Procedure*, § 12.03[c] at page 12-16.[3] In any event, numerous courts have held that California resident status has little to do with federal immigration status.[4] Plaintiff is a taxpayer and owns the home in which he and his five-year old daughter reside. Shimizu Dec. II at ¶ 3. Plaintiff has enjoyed a good reputation generally and in his occupation. *Id.*

Defendant Shinchosha claims to be resident in Japan. It is the publisher of Focus magazine. Focus is a sensationalist tabloid which uses large photographs (therefore the name "Focus") to expose its subjects. A recent survey of awards for libel in Japan found 21 reported decisions between 1980 and 1989. Of these 21 decisions, five (about 1/4 of all reported libel and defamation awards in Japan) involved defendant's Focus magazine. *Id.* In short, Focus magazine is Japan's

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[3] "E" visa holders "need not show that they are coming to the United States for a specific, limited period of time." S.Rep.No. 1515, 81st Cong., 2d Sess. 563 (1950); *Matter of Udagawa*, 14 I&N Dec. 578, 581 n. 3 (BIA 1974); *Immigration Law and Procedure, supra*, § 17.08 at page 17-46.

[4] *See, e.g., Cabral v. State Board of Control*, 112 Cal.App.3d 1012, 1016-17, 169 Cal.Rptr. 604 (1980) (undocumented aliens considered "residents of the State" for purposes of victim of violent crime benefits); *Dermegerdich v. Rank*, 151 Cal.App.3d 848 (1984) (undocumented aliens considered residents for purposes of certain medical benefits under the California Welfare and Institutions Code).

"National Inquirer," and is admittedly distributed to and read by the Japanese community world-wide.

On May 26, 1989, defendant published and circulated an article in Focus magazine regarding plaintiff which is libelous on its face, slanderous and defamatory. The article recklessly, negligently, intentionally and falsely states *inter alia* that:

> Plaintiff was arrested and charged with staying illegally in the United States with a forged passport, forged permanent residence certification card, and forged birth certificate ... Plaintiff was pursued in [in the United States by] an international police dragnet under suspicion of swindling 20 million dollars ... Plaintiff conducted a stock trading manipulation on a massive scale on the Osaka Stock Exchange in 1985 ... Plaintiff was rumored to have financial resources provided by an employee of a corporation affiliated with some gangster organization ... Plaintiff put the money that he earned [from the alleged stock manipulation] into real estate [in California] ... Plaintiff attempted to assume Mexican citizenship [in California] with a forged Mexican birth certificate.

Complaint ¶¶ 6-7. The article also states that plaintiff "entered [the United States] at Los Angeles on [a] tourist visa and put the money he earned [allegedly through a stock "swindle"] into real estate [in Los Angeles], that "among the properties he invested in [in California] were a residential palace ... in Palos Verdes [readers are then referred to a photograph of plaintiff's "palace"], a condo [readers are again referred to a photograph of the condo], [and] Yoro-no-Taki restaurant [readers are referred to a photograph of the Los Angeles restaurant]." *Id.*

Readers are then told for the second time that plaintiff "attempted to assume a [sic] Mexican citizenship with a forged Mexican birth certificate [in California] ... but upon the request made by the Japanese Police authorities, the U.S. Immigration and Naturalization Service and Los Angeles Police Department finally arrested him as shown in the photograph." Complaint, Exhibit 1, pp. 3-4 (English translation of article). Readers are referred to a page-size unauthorized photograph of plaintiff in leg chains and handcuffs taken while plaintiff was in INS custody in a supposedly secure area of the Los Angeles federal building. The article concludes that "[m]ak[ing] a big hit in speculation and hunt[ing] for real estate in overseas markets is a crime which modern Japanese are likely to conceive nowadays." *Id.* p. 4

Plaintiff was arrested by the INS (not the Los Angeles police Department) and briefly detained, but it was for overstaying a visitor's visa, a relatively minor charge later withdrawn by the INS,[5] not for possessing "a forged passport,

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[5] In *Shimizu v. Department of State, et al.*, Cv. No. 89-2741-WMB(Ex) (C.D. Cal.) the district court issued summary judgment in favor of Mr. Shimizu by order dated July 30, 1990. The order required the Department of State to reissue to Mr. Shimizu an "investors" visa improperly revoked during a brief trip Mr. Shimizu took to Canada in 1988. Mr. Shimizu was permitted to return to the United States on a "visitors' visa to wrap up his affairs after his investor visa was revoked. He returned on the visitor's visa and overstayed. After his arrest, the subject of the Focus magazine article, plaintiff successfully challenged the revocation of his investor visa. In compliance with the district court order, Mr. Shimizu's investor's visa has

forged permanent residence certification card, and forged birth certificate." Nor was plaintiff Shimizu "pursued in an international police dragnet." Nor has plaintiff ever had "financial resources provided by an employee of a corporation affiliated with some gangster organization." Nor has plaintiff "put the money that he earned [from illegal acts] into real estate [in California]."

As any reasonable person could foresee, the article "exposed plaintiff to hatred, contempt, and ridicule," Complaint ¶ 7. It is "false because plaintiff did not engage in the actions stated in the article." *Id.* ¶ 8. With "ordinary and reasonable care defendant could have discovered that the article was false and grossly libelous." *Id.* ¶ 10.

It is undisputed that this issue of Focus magazine was distributed, sold and read in California. As a proximate result of the above-described publication, plaintiff suffered damage in California to his reputation and business. *Id.* ¶¶ 15-16.

The declaration of Masahide Nogi, an employee of defendant and a Focus magazine reporter, states that he wrote the article in question. Motion to Quash Service of Summons, Declaration of Masahide Nogi ("Nogi Declaration"), ¶ 1.[6] He asserts that other than "a few" telephone calls with the

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been returned to him and the deportation hearing administratively terminated.

[6] Without explaining the basis for his claim, he states that when he wrote the article he "believed . . . that its contents were true and correct . . ." *Id.* Defendant has refused to respond to discovery which would explain the basis for this self-serving, untested assertion.

photographer in California who took the photographs accompanying the article, all of his "research" was done in Japan. *Id.* ¶ 3. He does not explain what that "research" involved, nor would defendant explain the scope of the writer's "research" in response to plaintiff's discovery requests. Defendant asserts that Mr. Nogi obtained "information" and the photographs published from a "photographer in Los Angeles," *id.* ¶ 7, but refused to disclose the identity of the Los Angeles "photographer," or provide any details about their relationship with him, improperly citing on his behalf a "newsmen's privilege" under Cal. Evid. Code § 1070.[7] Defendants

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[7] Defendant improperly asserted what they dubbed a "newsman's privilege" in refusing to disclose, *inter alia*, (1) the name, address and telephone number of the "photographer" who provided, for a fee, the information used to write the article (Form Interrog. 12.2); (2) the time, date and place of surveillance of plaintiff (Form Interrog. 13.1); (3) whether the photographer is an agent or independent contractor for defendants (Interrog. 4); (4) all documents to or from the photographer (Request for Production # 1). Article I, § 2 of the Cal. Constitution and Cal. Evid. Code § 1070 prevent a publisher from being "adjudged in contempt ... for refusing to disclose the source of any information procured ... for publication" when obtained from "a confidential source." Defendant publishers are not granted a "privilege" in damage actions to hide the names of their own reporters, photographers, agents or representatives. And even when a defendant in a civil action refuses to provide information about a *bona fide* informant, he "may be subject to a variety of other sanctions, including the entry of judgment against him. Neither Evidence Code § 1070 nor article I, section 2 protects a party against such sanctions." *Mitchell v. Superior Court*

similarly refused to provide other information relevant to the "minimum contacts" inquiry in response to plaintiff's discovery requests. Plaintiff filed a motion to compel further responses on the jurisdictional matters. Defendant was not required to more fully respond to discovery because the superior court denied defendant's jurisdictional challenge based on the evidence of record at the time.

Defendant's second declaration is executed by defendant Akio Goto, a director of defendant Shinchosha Co. and editor of Focus magazine. Motion to Quash Service of Summons, Declaration of Akio Goto ("Goto Declaration"), ¶ 1. He declares that Shinschosa publishes books and magazines, including the works of "American authors." *Id.* at 76, ¶ 2.[8] Mr. Goto declares that defendant "sells or consigns" its magazines to "three independent Japanese distributors" who in turn distribute the product around the world, including in California. *Id.* ¶ 6. Mr. Goto claims that he is "informed and believes" that only "40 (forty)" issues of Focus are delivered by

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(1984) 37 Cal.3d 268, 208 Cal.Rptr. 152, 154. Defendant's assertion of what it called the "newsman's" privilege was completely without legal justification. Even were this Court to grant certiorari, and conclude that the record did not support the Superior Court's exercise of discretion, the matter would likely be remanded for further proceedings on plaintiff's motion to compel discovery on issues relevant to the minimum contacts analysis.

[8] Defendant's summary responses to plaintiff's discovery requests fail to explain what "American authors" are published by defendant Shinchosha, or the nature of defendant's agreements with these American authors.

defendant's distributors to bookstores in California. *Id.* This inadmissible hearsay statement[9]--allegedly obtained from unknown persons associated with defendant's independent distributors--are rebutted by the personal observations of two declarants. A random check of three bookstores in Los Angeles uncovered about one hundred and ten (110) issues of Focus magazine available for purchase weekly (or about 473 per month or 5,676 per year).[10] While defendant Shinchosha repeatedly asserts that only "forty (40) copies of [Focus magazine] ... are distributed in California by [defendant's] independent distributors," Petition at i, 3, 10, 13, the Superior Court, citing plaintiff's declarations, which are "based upon personal observations at Los Angeles bookstores," agreed that defendant sells "a substantial number of publications in California, including Focus magazine." Ruling on Motion to Quash, p. 1 (emphasis added).

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[9] Plaintiff objected to their admissibility for purposes of determining subject matter jurisdiction. Supp. to Plaintiff's Opposition to Def.'s Motion to Quasn, filed April 11, 1991, at 2. Mr. Goto fails to identify the persons who provided him with the information, nor does he state how or from whom they purportedly obtained the information.

[10] Opposition to Motion to Quash, Exhibit 1, Declaration of Attorney Anne Inoue, filed Feb. 15, 1991 ("Inoue Declaration"); Supplement to Plaintiff's Opposition to Defendant's Motion to Quash, filed April 11, 1991, Exhibit 2, Declaration of Robert Rikimaru ("Rikimaru Declaration") at ¶ 6 (Mr. Rikimaru observed forty-five [45] issues of Focus magazine in one bookstore alone).

Furthermore, however many copies of Focus magazine are sold or otherwise distributed in California, defendant has said little about but has not disputed that thousands of its publications are sold in the State of California. On February 11, 1991, K. Anne Inoue, an attorney, visited a book store in Los Angeles and, *inter alia*, found an entire section of "Shinchosha Bunko," paperback fictions published by defendant Shinchosha. *Id.* In all she counted approximately 70 shelves carrying books published by defendant Shinchosha, for a total of approximately 4,200 books in one bookstore. Inoue Declaration at ¶ 3. *See also* Rikimaru Declaration at ¶¶ 4-5 (Mr. Rikimaru visited one book store and observed over 2,500 books and magazines published by defendant).[11]

In the face of these facts, Mr. Goto claims that defendant "derives no income from California." *Id.* ¶ 5. Defendant's books are not being given away in California. If defendant "derives no income from California" from the sale of thousands of its publications, it offers no explanation as to who is pocketing its profits.

Defendant never explained how its profits from the sales of its books in California are received. It claimed that it "sells or consigns" magazines, including Focus, to "three independent Japanese distributors" who in turn distribute the product in California. Goto Dec., ¶ 6. Defendant failed to provide any

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[11] Defendant never addresses how many copies of Focus magazine or its other publications are distributed and sold in other states in the United States. All of those sales would further support jurisdiction in California, the state of plaintiff's residence and where he experienced the injury.

details regarding the terms of such alleged sales or consignments, and refused to elaborate in its response to discovery sought by plaintiff on defendant's claim of insufficient contacts with California.

Defendant's oft-repeated but unsupported assertion that only 40 issues of Focus magazine are available in California is based solely on an untested, inadmissible hearsay statement.

In summary, defendants' limited responses to discovery and defendant Goto's declaration concede at least the following contacts with California:

1. A person in Los Angeles defendant refuses to identify (frivolously claiming a "newsman's" privilege) was paid by defendant for unauthorized photographers he had taken of plaintiff while in INS custody and for other "information" about plaintiff used in the article which is the subject of this case. Goto Declaration ¶ 7.
2. Defendant Shinchosha entered into at least one contract with an actor in California to do a tape-recording for defendants and sent an employee to California to make the recording with the actor (Gregory Peck). Defendant's Responses to Interrogatories, Response 4.
3. Defendant Shinchosha sent two employees -- a reporter and a photographer -- to Los Angeles to do research for at least one book published by defendant. *Id.*
4. Defendant Shinchosha directly sends 24 magazines to subscribers in California. *Id.* Response No. 6.
5. At the time of the publication of the article at issue defendant Shinchosha was aware that "some" issues of

Focus magazine were sold in the State of California. Response to Request for Admission No. 6.

7. Defendant Shinchosha accepted an advertisement for a "condominium complex in California" in one of its magazines. *Id.* at Response No. 12.

8. Defendants' responses to discovery and declarations provide no rebuttal to the evidence filed by plaintiff that thousands of defendants' publications are available for purchase in Los Angeles book stores.

9. The article in question concerns plaintiff who is a resident of California, falsely charging a variety of illegal acts in California.

ARGUMENT

I. NEITHER THE FACTS OF THIS CASE NOR THE ISSUES PRESENTED WARRANT PLENARY PRE-TRIAL REVIEW BY THE SUPREME COURT

It is well established law in the courts of California that absent extraordinary reason, "the parties must await a review by appeal from the final judgment." *Burrus v. Municipal Court*, 36 Cal.App.3d 233, 236 (1973). Defendant has failed to demonstrate an extraordinary reason justifying the intervention of the United States Supreme Court in the pre-trial proceedings now moving forward in the California trial court in this case. Defendant simply argues what any other defendant could claim after denial of a motion to quash service -- namely that, without the extraordinary intervention of the Supreme

Court, they will be required to proceed to trial. This is the same claim that could be made by every party who fails to succeed on a pre-trial dispositive motion. There is nothing extraordinary about defendants petition at all. "If reviewing courts made themselves routinely available to intervene [in trial court proceedings] whenever a litigant claimed a mistake has been made in a law-and-motion department, trials would be delayed, litigants would be vexed with multiple proceedings, and judgment appeals would be kept waiting." *Burrus*, 36 Cal.App.3d at 236.

> In a similar vein, Chief Justice Vinson noted in 1949 :
>
> The function of the Supreme Court is . . . to resolve conflicts of opinion on federal questions that have arisen among the lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi (emphasis added).

This is not a case involving a federal issue. The issue of subject matter jurisdiction arises under California law -- the primary issue being whether the assertion of jurisdiction violates state notions of fundamental fairness and due process. Defendant's primary focus throughout has been on California's

due process limitation on subject matter jurisdiction. Mr. Justice Brennan has pointed out that "[c]rucial to the exercise of our *certiorari* jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States Constitution or under federal laws or treaties." Mr. Justice Brennan, State Court Decisions and the Supreme Court, 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

Nor does this case involve a state court ruling in which the validity of a state statute is drawn into question on the ground of its being repugnant to federal law. The sole issue presented for review at this early stage of the case is the discretion exercised by a California state court judge, based upon findings of fact with which defendant disagrees, to deny a motion to quash service of a summons and complaint on the ground of insufficient minimum contacts.

Defendant argues this case "deserves attention" to clarify what was "left open" in *Asahi v. Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987) and *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). Petition at 15. The issue defendant claims "left open" in *Asahi* and *Keeton* is "how much contact with the [forum] state is enough to assert jurisdiction." *Id.* This is precisely the issue addressed by this Court in *Asahi*, *Keeton* and other "minimum contacts" cases (discussed *infra*). "How much" contact is required cannot be answered in one case. This Court has established the standards for lower courts to follow, and whether or not sufficient minimum contacts exist is generally a factual case-by-case determination. Defendant entirely fails to explain how Supreme Court review in this case, in which the facts are not yet fully developed

because defendant opposed discovery and defendant disagrees with the facts found by the trial court, the Court could in any meaningful way advance the law on minimum contacts for jurisdictional purposes. On the facts as determined by the trial court, rather than as presented in defendant's Petition, no current authority would disagree that the assumption of jurisdiction was proper. *See generally Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 384 (5th Cir. 1989), *cert. den.*, 110 S.Ct. 83 (1989); *Morris v. SSE, Inc.*, 843 F.2d 498, 493 (11th Cir. 1988). In fact, the law governing this case is clearly set forth in *Calder v. Jones*, 465 U.S. 781, 104 S.Ct. 1482 (1984) (personal jurisdiction over employees of out-of-state magazine proper where they should have recognized the effect of their article would damage a California resident).

In *Asahi* this Court unanimously decided that jurisdiction over the alien defendant would be "unreasonable and unfair." *Id.* at 116. The Court divided on the issue whether the placement of manufactured goods in the "stream of commerce" alone was sufficient to establish a basis for minimum contacts and therefore jurisdiction. Three Justices felt the analysis was unnecessary given the Court's decision that jurisdiction was unreasonable. Justice O'Connor, writing for four justices concluded that "mere placement" of goods in the stream of commerce was insufficient to establish minimum contacts. *Id.* at 112. And Justice Brennan, writing for four Justices, concluded that jurisdiction premised on the placement of a product into the stream of commerce "is consistent with the Due Process Clause." *Id.* at 117.

However, as we have already pointed out, this case does not raise the same issue whether "defendant's mere awareness of distribution" in the "stream of commerce" gives rise to jurisdiction. Petition at 16. As the Superior Court found, based on more than sufficient evidence, defendant has "wide ranging" business ties to California making jurisdiction proper over its publication of a highly defamatory article about a California resident and events that allegedly took place in California. In short, this is not a "stream of commerce" case, but a libel and defamation action. As discussed below, this Court has adopted a different approach to minimum contacts in the context of libel actions versus the transportation of other goods across state or national boundaries.

Furthermore, this case does not present "an opportunity" to address the questions posed by defendant because the lower court did not rule on the questions briefed by defendant.[12] On the contrary, based on the evidence of record (despite defendant's refusal to fully respond to discovery regarding their

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[12] Defendant repeats its erroneous assertion regarding what the Superior Court ruled throughout its Petition. *See, e.g.* Petition at i (Questions Presented), 5 (jurisdiction assumed "by virtue of [defendant's] published products being sold in California"), 7 (jurisdiction was based "solely on defendant's awareness that its products may reach the forum state through the 'stream of commerce'"), 10 (defendant's "only conceivable 'contact' with California was its potential knowledge that a small number of its publications reached the state"). As defendant must surely know, and as a review of the Superior Court order clearly indicates, none of these statements are accurate.

California-contacts), the Superior Court held that "[d]efendant's activities in California are wide ranging." Ruling on Motion to Quash, p. 2. As noted in the Statement of Facts, *supra*, the Superior Court concluded, *inter alia,* that (1) Focus magazine, the subject of this lawsuit, "is sold in California," (2) "[D]efendant does sell a substantial number of publications in California, (3) "[D]efendant does business in California in a broad manner," (4) "[Defendant] sells its products (albeit through intermediate distributors) in the usual stream of business," (5) "[Defendant] is aware of the world wide distribution of its products," (6) "[Defendant] publishes and sells by using an apparent systematic business process whereby its products are distributed inside and outside of Japan, (7) "The fact [defendant's] product reaches the bookstores in California is not surprising and manifests its wide ranging business activities," (8) "The subject article specifically concerned a California resident," (9) "The accompanying photograph of plaintiff was obviously taken in California, presumably by an agent or representative of defendant," (10) "This is not a situation where defendant's California activities are occasional ." Ruling on Motion to Quash, p. 1-2. Contrary to defendant's repeated assertions to this Court, the Superior Court's order clearly did not rule that minimum contacts sufficient to satisfy due process existed "solely" based on "the defendant's awareness that its products reach the forum state through the stream of commerce."

Therefore, even if this Court believed the question posed by defendant (whether jurisdiction is proper based "solely" on defendant's "awareness that its products reach the forum state

through the 'stream of commerce'") was worthy of plenary review, the question is plainly not presented for review in this case.

A petition for certiorari is in substance a request for the Court to exercise its discretionary power to review the case, a request which may be denied because the Court does not regard the points raised as sufficiently important for it to review. There is no reason to believe that this case raises the kind of important issues to which the Court limits its grant of petitions for certiorari.

II. THE SUPERIOR COURT CLEARLY DID NOT ABUSE ITS DISCRETION IN REFUSING TO QUASH SERVICE OF THE SUMMONS AND COMPLAINT IN THIS CASE

A. CALIFORNIA COURTS POSSESS BROAD AUTHORITY TO ASSERT JURISDICTION OVER FOREIGN DEFENDANTS WHOSE TORTIOUS CONDUCT RESULTS IN INJURY TO A RESIDENT

California Code of Civil Procedure § 410.10 provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." California has "chosen to provide the broadest possible form of jurisdiction to its courts." *500 Motors, Inc v. Superior Court*, 122 Cal.App.3d 827, 176 Cal.Rptr. 349 (1981) (emphasis added), properly "limited only by constitutional considerations." *Rollins Burdick Hunter of S. Cal. Inc. v. Alexander & Alexander Services, Inc.*, 206

Cal.App.3d 1, 5, 253 Cal.Rptr. 338 (1988), *citing Sibley v. Superior Court*, 16 Cal.3d 442, 445, 128 Cal. Rptr. 34, 36 (1976), *cert. den.* 429 U.S. 826 (1976). A plaintiff need only establish by a "preponderance of the evidence that all necessary jurisdictional criteria are met." Ziller Electronics Lab GmbH v. Superior Court, 206 Cal.App.3d 1222, 1233, 254 Cal.Rptr. 410 (1988) (citations omitted).

B. DEFENDANT IS SUBJECT TO THE GENERAL JURISDICTION OF CALIFORNIA

Regardless of whether defendant sells one or one thousand copies of Focus magazine in the state of California, the courts may assert "general" jurisdiction over defendant in light of its significant contacts with the state. It is unrebutted that defendant's products, primarily books and magazines, are widely distributed in California. In one book store alone in Los Angeles plaintiff has identified over four thousand books published by defendant. Inoue Declaration at ¶ 3. In addition, defendant has accepted advertisements from California, has entered into contracts in California, and has sent employees to California to research books.

When a defendant has sufficiently extensive contacts with the forum state, it may be subject to suit there on all claims wherever they arise. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, 80 L.Ed.2d 404, 411, 104 S.Ct. 1868, 1872 (1984); *Secrest Machine Corp. v. Superior Court*, 33 Cal.3d 664, 669, 190 Cal.Rptr. 175, 600 P.2d 399 (1983) (when nonresident's activities are extensive or wide-ranging, or substantial, continuous and systematic, there is a

constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against him).

Through the wide sale of its publications in the State of California, defendant's forum-related activity reaches such extensive proportions "as to make the defendant sufficiently 'present' in the forum state to support jurisdiction over it . . ." *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc.*, 276 C.A.2d 610, 617, 81 Cal.Rptr. 320 (1969).

C. IF DEFENDANT'S CONTACTS ARE INSUFFICIENT TO SUSTAIN GENERAL JURISDICTION, THEY ARE CLEARLY SUFFICIENT TO ESTABLISH LIMITED JURISDICTION

Defendant has repeatedly argued that its Focus magazine is sold in California by independent distributors and therefore defendants should be permitted to avoid jurisdiction in this state. Petition at 4, 11, 15, 17, etc. All modern authority rejects this argument. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980), this Court made clear that "if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury . . . " 100 S.Ct. at 567 (emphasis added).[13]

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[13] *See also Buckeye Boiler Co. v. Superior Court*, 71 Cal.2d 893, 80 Cal. Reptr. 113, 458 P.2d 57 (1969) ("A manufacturer's economic

Indeed, "[a] state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects . . ." *Sibley v. Superior Court,* 16 Cal.3d 442, 446, 546 P.2d 322, 324, 128 Cal. Rptr. 34, 36 (1976), *cert. den.* 429 U.S. 826 (1976).(emphasis added).[14]

The "effects test," which defendant chooses to ignore, was upheld by this Court in *Calder v. Jones*, 465 U.S. 781, 104 S.Ct. 1482 (1984), the most recent Supreme Court case dealing with "minimum contacts" in a libel action.

In *Calder* actress Shirley Jones, a professional entertainer, filed suit for libel and defamation against the National Enquirer, Iain Calder, editor of the magazine, John South, the reporter who wrote the article in question, and a California distributor.

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relationship with a state does not necessarily differ in substance, nor should its amenability to jurisdiction necessarily differ, depending on whether it deals directly or indirectly with residents of the state"). The indirect manner in which products might be distributed in the state "effect[s] little, if any, [question] of the jurisdictional situation." *Regie Nationale Des Usines Renault v. Superior Court,* 208 Cal.App.2d 702, 703, 25 Cal.Rptr. 530, 531.

[14] *See also Bartlett v. Superior Court,* 86 Cal.App.3d 72, 150 Cal. Rptr. 25 (1978) ("One of the recognized bases for jurisdiction in California arises when the defendant has caused an 'effect' in the State by an act or omission which occurs elsewhere"); *Seagate Technology v. AJ Kogyo Co. Ltd.*, 219 Cal.App.3d 703, 268 Cal.Rptr. 586, 589 (1990) ("where [foreign defendants] are alleged to have engaged in intentional tortious activity, directed at a California resident, jurisdiction over them is proper.")

Only Smith and Calder challenged the jurisdiction on the California courts, arguing they had no contacts in California. In granting the motion to quash, the Superior Court used language remarkably similar to that found in defendants' Petition, noting that neither Calder nor Smith "maintained any residence or business office within California. Editor Calder did not enter California nor even make telephone calls into the state during his work on the article. Reporter Smith made a few telephone calls into California . . . The totality of such contacts, in this Court's view, are [sic] insubstantial." *See Jones v. Calder*, 187 Cal.Rptr. 825 (1982) (emphasis added).

However, the California Court of Appeals reversed, holding that jurisdiction was proper because the "effects" of defendants' libelous article were felt in California. *Id.* Calder and Smith appealed to this Court, which affirmed the California Court of Appeal's decision. This Court held:

> The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects . . . The Court of Appeals further suggested that petitioner's South's . . . numerous telephone calls to California, formed an independent basis for an assertion of jurisdiction over him in this action. In light of our approval of the "effects" test employed by the California court, we find it unnecessary to reach this alternative ground . . . [The] lack of "contacts" will not defeat otherwise proper jurisdiction. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises .

> . . The alleged libelous story concerned California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California. The . . . brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California . . . Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California . . . An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California . . . .

104 S.Ct. at 1485-1487 (emphasis added).

Similarly in this case, (1) "[t]he fact that the actions causing the effects in California were performed outside the State [does] not prevent the State from asserting jurisdiction over a cause of action arising out of those effects," (2) "the plaintiff is the focus of the activities of the defendants out of which the suit arises," (3) "[t]he alleged libelous story concerned California activities of a California resident."[15] (4) the challenges article "impugned the professionalism" of the plaintiff whose work is "centered in California," and (5) the "brunt of the harm, in terms both of respondent's emotional distress and the injury to [his] professional reputation, was suffered in California." Under these circumstances, jurisdiction over petitioners is proper in California. As this Court has warned, under these

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[15] Defendants repeatedly argue that plaintiff is only a "temporary" resident of California. This is not true. See footnote 3 and accompanying text.

circumstances defendants must "reasonably anticipate being haled into court . . . to answer for the truth of the statements made in their article." *Calder v. Jones,* 104 S.Ct. at 1487.

The cases relied upon by defendants are out-dated and/or inapposite to the issue decided by the Superior Court. Defendants cite *Cornelison v. Chaney*, 16 Cal.3d 143 (1976), at length for the proposition that a defendant's actions in the forum state must be "wide ranging" for jurisdiction to attach. *Cornelison* is a pre-*Calder* case, and, in any event, involves products liability, not a libel.

As it did before the Superior Court, defendant also relies on *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship,* 146 Cal.App.3d 468, 194 Cal.Rptr. 240 (1983). Petition at 13. *Evangelize China Fellowship* is a pre-*Calder* case which is cited by defendants because it focused on the low "number" of issues of the allegedly libelous article circulated in the forum state. *Id.* at 444. However, both *Calder* and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (both decisions were issued on the same day) cast significant doubt on the continued vitality of earlier holdings that relatively small levels of circulation are insufficient minimum contacts to support jurisdiction. Defendant ignores this Court's holding that:

> [r]espondent's regular circulation of magazines in the forum state is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine.

Hustler Magazine, Inc., 104 S.Ct. at 1478. Jurisdiction was considered proper in New Hampshire, where neither plaintiff

nor defendant resided, "even though only a small portion of those [libelous] copies were distributed in New Hampshire." 104 S.Ct. at 1479 (emphasis added). Similarly, in *Calder*, defendants Calder and South, sued in their personal capacities, circulated no magazines in California at all -- they only worked for a company which did.

Finally, the Court may consider the interests of the plaintiff, defendants and the state in the assertion of jurisdiction in California. Here, in their own words, defendant is the "largest" publishing house in Japan. It obviously has vast resources compared with plaintiff and has retained one of the largest law firms in the country to represent it in these proceedings. Defendant has not argued that it is without the resources to litigate this case in California where the material for the article at issue originated, the subject of the article (the plaintiff) resides, the circumstances giving rise to the article (plaintiff's arrest by the INS) took place, the photograph published was taken and where the injury to plaintiff's reputation was felt.

On the other hand plaintiff is without the resources to litigate this case in Japan, and, in any event, could not presently travel to Japan without jeopardizing his resident status in the State of California. Plaintiff does not have the resources necessary to litigate this case in Japan, and plaintiff's witnesses regarding the injury to his reputation caused by defendant's libelous publication are all located in California.

Finally, "the state always has an interest in providing a forum for its residents." *Tiffany Records, Inc.v. M.B. Krupp*, 276 C.A.2d 610, 619, 81 Cal.Rptr. 320 (1969).[16]

In *Keeton* the Supreme Court recently stressed the interest of the state in providing a remedy for libelous publications by non-forum publishers:

> "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it affords protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort." [Citation omitted] . . . False statements of fact harm both the subject of the falsehood and the readers of the statement. [The states] may rightly employ [their] libel laws to discourage the deception of [their]

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16 The state clearly has a strong interest in providing a forum to its residents who are libelled in publications made available to purchasers and readers in the state. *See* Restatement (2d) Conflict of Laws, quoted in the Judicial Council's Comments to Code of Civil procedure section 410.10, Comment a to section 37 ("A state has a natural interest in the effects of an act within its territory even though the act itself as done elsewhere"). *See also Kaiser Aetna v. Deal*, 86 Cal.App.3d 896, 901, 150 Cal.Rptr. 615 (1978) ("A state has a special interest in exercising jurisdiction over those who commit tortious acts within its territory. Therefore, it is reasonable that a state should exercise jurisdiction over those who commit or cause to be committed in the state what is claimed to be a tortious act").

> citizens. There is 'no constitutional value in false statements of fact.' [Citation omitted].

Keeton, 104 S.Ct. at 1479 (emphasis added).

CONCLUSION

The law does not and should not contemplate that foreign companies have a free hand to injure California residents through slanderous and libelous publications because their publications reach readers only through independent distributors. Were that the rule, foreign publications could promote their products over domestic publications through uninhibited public defamations and sensationalism without regard to the harmful consequences of their tortious conduct. As much as defendant may wish it were so, thankfully such is not the law in this country.

The Superior Court's order denying defendants' motion to quash service was clearly not an abuse of discretion. Defendant has now filed a verified answer and this case should proceed to trial.

Plaintiff respectfully requests that this Court deny defendant's petition.

Respectfully submitted,

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